

AMENDED IN SENATE APRIL 10, 2007

SENATE BILL

No. 738

Introduced by Senator Calderon

February 23, 2007

An act to amend Section 7108.5 of the Business and Professions Code, to amend Sections ~~3252 and 3260~~ 3098 and 3252 of the Civil Code, and to amend Sections 10262 and 10262.5 of the Public Contract Code, relating to works of improvement.

LEGISLATIVE COUNSEL'S DIGEST

SB 738, as amended, Calderon. Works of improvement.

(1) Existing law, the Contractors' State License Law, requires a prime contractor or subcontractor to pay to any subcontractor, not later than ~~within~~ 10 days of receipt of each progress payment, unless otherwise agreed to in writing, the respective amounts allowed the contractor on account of the work performed by the subcontractors, to the extent of each subcontractor's interest therein. A similar provision applies under the State Contract Act with respect to payments made by a contractor, prime contractor, or subcontractor to a subcontractor. Any contractor or his or her agent or employee who permits the violation of any contract awarded pursuant to the State Contract Act to the injury of the state, and any subcontractor or agent or employee of any contractor or subcontractor who has knowledge of any work being done in violation of any contract under the State Contract Act and does not report it, as specified, is guilty of a felony punishable by imprisonment in the state prison.

This bill would instead require, under both the Contractors' State License Law, *as applicable to public works of improvement only*, and the State Contract Act, a contractor, prime contractor, or subcontractor,

as applicable, to pay those amounts to the subcontractor not later than ~~within~~ 7, rather than 10, days of receipt of each progress payment. By expanding the scope of a crime, the bill would impose a state-mandated local program.

(2) Under existing law, if labor, service, equipment, or materials have been furnished to a jobsite by a claimant who did not give a 20-day public work preliminary bond notice, then that claimant is not precluded from giving a preliminary notice at any time thereafter. However, existing law then only allows that claimant to assert a claim against a payment bond and to file a stop notice for labor, service, equipment, or material furnished within 20 days prior to the service of that preliminary notice, and at any time thereafter.

This bill would delete the provision that related to asserting a claim against a payment bond.

~~(2)–~~

(3) Existing law requires that a 20-day public work preliminary bond notice be given under specified circumstances. If the notice is not given, a claimant may enforce a claim by giving written notice to the surety and the bond principal within 15 days after recordation of a notice of completion. If no notice of completion has been recorded, the time for giving written notice to the surety and the bond principal is extended to 75 days after completion of the work of improvement.

This bill would delete the provisions authorizing a claimant to enforce a claim by giving written notice to the surety and the bond principal within 15 days after recordation of a notice of completion and extending the time for giving written notice to the surety and bond principal to 75 days after completion of the work of improvement if a notice of completion has not been recorded.

~~(3) Existing law requires the original contractor to pay each of its subcontractors from whom retention has been withheld, each subcontractor's share of the retention received, within 10 days from the time that all or any portion of the retention proceeds are received by the original contractor. Within 10 days of receipt of written notice by the owner from the original contractor or by the original contractor from the subcontractor, as applicable, that any work in dispute has been completed in accordance with the terms of the contract, the owner or original contractor is required to advise the notifying party of the acceptance or rejection of the disputed work. Within 10 days of acceptance of the disputed work, the owner or original contractor is required to release the retained portion of the retention proceeds.~~

~~This bill would require those acts to be taken within 7, rather than 10, days.~~

(4) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 7108.5 of the Business and Professions
2 Code is amended to read:

3 7108.5. ~~A~~ (a) *On all private works of improvement, a prime*
4 *contractor or subcontractor shall pay to any subcontractor, not later*
5 ~~than within seven~~ 10 *days of receipt of each progress payment,*
6 *unless otherwise agreed to in writing, the respective amounts*
7 *allowed the contractor on account of the work performed by the*
8 *subcontractors, to the extent of each subcontractor's interest*
9 *therein.* ~~In the event that there is a good faith dispute over all or~~
10 ~~any portion of the amount due on a progress payment from the~~
11 ~~prime contractor or subcontractor to a subcontractor, then the prime~~
12 ~~contractor or subcontractor may withhold no more than 150 percent~~
13 ~~of the disputed amount.~~

14 (b) *On all public works of improvement, a prime contractor or*
15 *subcontractor shall pay to any subcontractor, not later than seven*
16 *days of receipt of each progress payment, the respective amounts*
17 *allowed the contractor on account of the work performed by the*
18 *subcontractors, to the extent of each subcontractor's interest*
19 *therein.*

20 (c) *In the event that there is a good faith dispute over all or any*
21 *portion of the amount due on a progress payment from the prime*
22 *contractor or subcontractor to a subcontractor, then the prime*
23 *contractor or subcontractor may withhold no more than 150*
24 *percent of the disputed amount.*

25 ~~Any~~

26 (d) Any violation of this section shall constitute a cause for
27 disciplinary action and shall subject the licensee to a penalty,
28 payable to the subcontractor, of 2 percent of the amount due per

1 month for every month that payment is not made. In any action
2 for the collection of funds wrongfully withheld, the prevailing
3 party shall be entitled to his or her attorney's fees and costs.

4 ~~The~~

5 (e) *The* sanctions authorized under this section shall be separate
6 from, and in addition to, all other remedies either civil,
7 administrative, or criminal.

8 ~~This~~

9 (f) *This* section applies to all private works of improvement and
10 to all public works of improvement, except where Section 10262
11 of the Public Contract Code applies.

12 *SEC. 2. Section 3098 of the Civil Code is amended to read:*

13 3098. "Preliminary 20-day notice (public work)" means a
14 written notice from a claimant that was given prior to the assertion
15 of a claim against a payment bond, or the filing of a stop notice
16 on public work, and is required to be given under the following
17 circumstances:

18 (a) In any case in which the law of this state affords a right to
19 a person furnishing labor or materials for a public work who has
20 not been paid therefor to assert a claim against a payment bond,
21 or to file a stop notice with the public agency concerned, and
22 thereby cause the withholding of payment from the contractor for
23 the public work, any person that has no direct contractual
24 relationship with the contractor, other than a person who performed
25 actual labor for wages or an express trust fund described in Section
26 3111, may file the preliminary notice, but no payment shall be
27 withheld from the contractor pursuant to that notice unless the
28 person has caused written notice to be given to the contractor, and
29 the public agency concerned, not later than 20 days after the
30 claimant has first furnished labor, services, equipment, or materials
31 to the jobsite, stating with substantial accuracy a general description
32 of labor, service, equipment, or materials furnished or to be
33 furnished, and the name of the party to whom the same was
34 furnished. This notice shall be served by mailing the same by
35 first-class mail, registered mail, or certified mail, postage prepaid,
36 in an envelope addressed to the contractor at any place the
37 contractor maintains an office or conducts business, or his or her
38 residence, or by personal service. In case of any public works
39 constructed by the Department of Public Works or the Department
40 of General Services of the state, such notice shall be served by

1 mailing in the same manner as above, addressed to the office of
2 the disbursing officer of the department constructing the work, or
3 by personal service upon the officer. When service is by registered
4 or certified mail, service is complete at the time of the deposit of
5 the registered or certified mail.

6 (b) Where the contract price to be paid to any subcontractor on
7 a particular work of improvement exceeds four hundred dollars
8 (\$400), the failure of that contractor, licensed under Chapter 9,
9 (commencing with Section 7000) of Division 3 of the Business
10 and Professions Code, to give the notice provided for in this
11 section, constitutes grounds for disciplinary action by the Registrar
12 of Contractors.

13 (c) The notice requirements of this section shall not apply to a
14 laborer described in Section 3089 or to an express trust fund
15 described in Section 3111.

16 (d) If labor, service, equipment, or materials have been furnished
17 to a jobsite by a claimant who did not give a preliminary notice
18 pursuant to subdivision (a), that claimant shall not be precluded
19 from giving a preliminary notice at any time thereafter. The
20 claimant shall, however, be entitled to ~~assert a claim against a~~
21 ~~payment bond and~~ file a stop notice only for labor, service,
22 equipment, or material furnished within 20 days prior to the service
23 of the preliminary notice, and at any time thereafter.

24 (e) The failure to provide, pursuant to Chapter 974 of the
25 Statutes of 1994, a written preliminary notice to a subcontractor
26 with whom the claimant has contracted shall not affect the validity
27 of any preliminary notice provided pursuant to this section.

28 ~~SEC. 2.~~

29 *SEC. 3.* Section 3252 of the Civil Code is amended to read:

30 3252. With regard to a contract entered into on or after January
31 1, 1995, in order to enforce a claim upon any payment bond given
32 in connection with a public work, a claimant shall give the 20-day
33 public works preliminary bond notice as provided in Section 3098.

34 ~~SEC. 3.~~ ~~Section 3260 of the Civil Code is amended to read:~~

35 3260. ~~(a) This section is applicable with respect to all contracts~~
36 ~~entered into on or after July 1, 1991, relating to the construction~~
37 ~~of any private work of improvement. However, the amendments~~
38 ~~made to this section during the 1992 portion of the 1991-92~~
39 ~~Regular Session of the Legislature are applicable only with respect~~
40 ~~to contracts entered into on or after January 1, 1993, relating to~~

1 the construction of any private work of improvement. Moreover,
2 the amendments made to this section during the 1993 portion of
3 the 1993-94 Regular Session of the Legislature are applicable only
4 with respect to contracts entered into on or after January 1, 1994,
5 relating to the construction of any private work of improvement.

6 (b) ~~The retention proceeds withheld from any payment by the~~
7 ~~owner from the original contractor, or by the original contractor~~
8 ~~from any subcontractor, shall be subject to this section.~~

9 (c) ~~Within 45 days after the date of completion, the retention~~
10 ~~withheld by the owner shall be released. "Date of completion,"~~
11 ~~for purposes of this section, means any of the following:~~

12 (1) ~~The date of issuance of any certificate of occupancy covering~~
13 ~~the work by the public agency issuing the building permit.~~

14 (2) ~~The date of completion indicated on a valid notice of~~
15 ~~completion recorded pursuant to Section 3093.~~

16 (3) ~~The date of completion as defined in Section 3086.~~

17 However, ~~release of retentions withheld for any portion of the~~
18 ~~work of improvement which ultimately will become the property~~
19 ~~of a public agency, may be conditioned upon the acceptance of~~
20 ~~the work by the public agency. In the event of a dispute between~~
21 ~~the owner and the original contractor, the owner may withhold~~
22 ~~from the final payment an amount not to exceed 150 percent of~~
23 ~~the disputed amount.~~

24 (d) ~~Subject to subdivision (c), within seven days from the time~~
25 ~~that all or any portion of the retention proceeds are received by~~
26 ~~the original contractor, the original contractor shall pay each of its~~
27 ~~subcontractors from whom retention has been withheld, each~~
28 ~~subcontractor's share of the retention received. However, if a~~
29 ~~retention payment received by the original contractor is specifically~~
30 ~~designated for a particular subcontractor, payment of the retention~~
31 ~~shall be made to the designated subcontractor, if the payment is~~
32 ~~consistent with the terms of the subcontract.~~

33 (e) ~~If a bona fide dispute exists between a subcontractor and the~~
34 ~~original contractor, the original contractor may withhold from that~~
35 ~~subcontractor with whom the dispute exists its portion of the~~
36 ~~retention proceeds. The amount withheld from the retention~~
37 ~~payment shall not exceed 150 percent of the estimated value of~~
38 ~~the disputed amount.~~

39 (f) ~~Within seven days of receipt of written notice by the owner~~
40 ~~from the original contractor or by the original contractor from the~~

1 subcontractor, as the case may be, that any work in dispute has
2 been completed in accordance with the terms of the contract, the
3 owner or original contractor shall advise the notifying party of the
4 acceptance or rejection of the disputed work. Within seven days
5 of acceptance of the disputed work, the owner or original
6 contractor, as the case may be, shall release the retained portion
7 of the retention proceeds.

8 (g) ~~In the event that retention payments are not made within the~~
9 ~~time periods required by this section, the owner or original~~
10 ~~contractor withholding the unpaid amounts shall be subject to a~~
11 ~~charge of 2 percent per month on the improperly withheld amount,~~
12 ~~in lieu of any interest otherwise due. Additionally, in any action~~
13 ~~for the collection of funds wrongfully withheld, the prevailing~~
14 ~~party shall be entitled to his or her attorney's fees and costs.~~

15 (h) ~~It shall be against public policy for any party to require any~~
16 ~~other party to waive any provision of this section.~~

17 (i) ~~This section shall not be construed to apply to retentions~~
18 ~~withheld by a lender in accordance with the construction loan~~
19 ~~agreement.~~

20 SEC. 4. Section 10262 of the Public Contract Code is amended
21 to read:

22 10262. The contractor shall pay to his or her subcontractors,
23 within seven days of receipt of each progress payment, the
24 respective amounts allowed the contractor on account of the work
25 performed by his or her subcontractors, to the extent of each
26 subcontractor's interest therein. The payments to subcontractors
27 shall be based on estimates made pursuant to Section 10261. Any
28 diversion by the contractor of payments received for prosecution
29 of a contract, or failure to reasonably account for the application
30 or use of the payments constitutes ground for actions proscribed
31 in Section 10253, in addition to disciplinary action by the
32 Contractors' State License Board. The subcontractor shall notify,
33 in writing, the Contractors' State License Board and the department
34 of any payment less than the amount or percentage approved for
35 the class or item of work as set forth in Section 10261.

36 SEC. 5. Section 10262.5 of the Public Contract Code is
37 amended to read:

38 10262.5. (a) Notwithstanding any other provision of law, a
39 prime contractor or subcontractor shall pay to any subcontractor,
40 not later than seven days of receipt of each progress payment, the

1 respective amounts allowed the contractor on account of the work
2 performed by the subcontractors, to the extent of each
3 subcontractor's interest therein. In the event that there is a good
4 faith dispute over all or any portion of the amount due on a progress
5 payment from the prime contractor or subcontractor to a
6 subcontractor, then the prime contractor or subcontractor may
7 withhold no more than 150 percent of the disputed amount.

8 Any contractor who violates this section shall pay to the
9 subcontractor a penalty of 2 percent of the amount due per month
10 for every month that payment is not made. In any action for the
11 collection of funds wrongfully withheld, the prevailing party shall
12 be entitled to his or her attorney's fees and costs.

13 (b) This section shall not be construed to limit or impair any
14 contractual, administrative, or judicial remedies otherwise available
15 to a contractor or a subcontractor in the event of a dispute involving
16 late payment or nonpayment by a contractor or deficient
17 subcontract performance or nonperformance by a subcontractor.

18 (c) On or before September 1 of each year, the head of each
19 state agency shall submit to the Legislature a report on the number
20 and dollar volume of written complaints received from
21 subcontractors and prime contractors on contracts in excess of
22 three hundred thousand dollars (\$300,000), relating to violations
23 of this section.

24 SEC. 6. No reimbursement is required by this act pursuant to
25 Section 6 of Article XIII B of the California Constitution because
26 the only costs that may be incurred by a local agency or school
27 district will be incurred because this act creates a new crime or
28 infraction, eliminates a crime or infraction, or changes the penalty
29 for a crime or infraction, within the meaning of Section 17556 of
30 the Government Code, or changes the definition of a crime within
31 the meaning of Section 6 of Article XIII B of the California
32 Constitution.